U.S. Department of Homeland Security
20 Mass, Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: PHOENIX DISTRICT OFFICE Date: OCT 25 2004

IN RE: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(i) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1182(i)

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

identifying data deleted to prevent [illegible]

DISCUSSION: The waiver application was denied by the District Director, Phoenix. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a native and citizen of Mexico. The applicant was found inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Immigration and Nationality Act (INA, the Act), 8 U.S.C. § 1182(a)(6)(C)(i). The record reflects that the applicant is the spouse of a U.S. citizen. He seeks a waiver of inadmissibility in order to remain in the United States with his wife.

The district director found that the applicant had failed to establish extreme hardship to his U.S. citizen spouse. The application for waiver was denied accordingly.

On appeal, counsel contends that the district director erred in failing to find extreme hardship. Counsel contends that the district director did not consider the appropriate factors, accurately weigh the evidence, or consider the factors in the aggregate. Counsel also submits that the precedent cases cited in the denial were inapposite and that the denial was an abuse of discretion. In support of the appeal, counsel submits a brief and the results of a paternity test. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(6)(C)(i) of the Act provides:

> In general.—Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

8 U.S.C. § 1182(a)(6)(C)(i). The district director based the finding of inadmissibility under this section on the applicant's admitted misrepresentation of his nationality in connection with an application for asylum filed in 1990. *Decision of the District Director* (September 10, 2003) at 2. The asylum application was signed by the applicant. Form I-589, *Request for Asylum in the United States* (filed November 7, 1990), at 4. The application is accompanied by a fraudulent Salvadoran birth certificate in the applicant's name. *Id.* At his asylum interview, the applicant signed a sworn statement, written in his native language, indicating that he had paid $120 to purchase the fraudulent birth certificate to help him pass as Salvadoran. *Record of Sworn Statement in Affidavit Form* (December 14, 1990). He apparently filed the application in an attempt to obtain employment authorization, which he was never granted on the basis of the asylum application. *See* Form I-213, *Record of Deportable Alien* (December 14, 1990). The asylum application is date-stamped by the former Immigration and Naturalization Service (INS), but there appears to be no record of it in USCIS automated records. It appears that, on December 14, 1990, the applicant admitted his prior misrepresentation to the examining adjudicator, who then treated the asylum application as withdrawn and directed the applicant to a deportation officer. He was granted administrative voluntary departure. Counsel notes that the applicant "never benefited" from his misrepresentation. *Brief in Support of Appeal to the Administrative Appeals Unit* (October 2, 2003), at 2 ("Brief").

By knowingly filing this application for asylum along with a false identity document, the applicant was seeking to procure immigration benefits, asylum and employment authorization, by willfully misrepresenting a material fact. Whether or not the benefit was ultimately obtained based on the misrepresentation is not

relevant under the statute. The district director's determination of inadmissibility under this section of the Act is therefore affirmed.

The question remains whether the applicant is eligible for a waiver of inadmissibility. Section 212(i) provides, in pertinent part:

> (i) (1) The Attorney General [now Secretary of Homeland Security] may, in the discretion of the Attorney General [now Secretary of Homeland Security], waive the application of clause (i) of subsection (a)(6)(C) in the case of an immigrant who is the spouse, son, or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the [Secretary] that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully permanent resident spouse or parent of such an alien . . ."

8 U.S.C. § 1182(i)(1). A section 212(i) waiver is therefore dependent upon a showing that the bar to admission imposes an extreme hardship on the U.S. citizen or lawfully resident spouse or parent of the applicant. Congress excluded from consideration extreme hardship to an applicant's children or other parties. In the present case, the applicant's spouse is the only qualifying relative under the Federal statute for which the hardship determination is permissible. Hardship to the applicant's children may only be considered to the extent that such hardship contributes to hardship to the applicant's qualifying relative. The only qualifying relative on record in this case is the applicant's spouse.

The concept of extreme hardship to a qualifying relative "is not . . . fixed and inflexible," and whether extreme hardship has been established is determined based on an examination of the facts of each individual case. *Matter of Cervantes-Gonzalez,* 22 I&N Dec. 560, 565 (BIA 1999). In *Matter of Cervantes-Gonzalez,* the Board of Immigration Appeals (BIA) set forth a list of non-exclusive factors relevant to determining whether an alien has established extreme hardship to a qualifying relative pursuant to section 212(i) of the Act. These factors include, with respect to the qualifying relative, the presence of family ties to U.S. citizens or lawful permanent residents in the United States, family ties outside the United States, country conditions where the qualifying relative would relocate and family ties in that country, the financial impact of departure, and significant health conditions, particularly where there is diminished availability of medical care in the country to which the qualifying relative would relocate. *Id.* at 566. The BIA has held:

> Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists. In each case, the trier of fact must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation.

Matter of O-J-O-, 21 I&N Dec. 381, 383 (BIA 1996) (citations omitted). Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez,* 21 I&N Dec. 296 (BIA 1996).

In addition, the Ninth Circuit Court of Appeals has held, "the most important single hardship factor may be the separation of the alien from family living in the United States," and, "[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion." *Salcido-Salcido v. INS,* 138 F.3d 1292, 1293 (9th Cir. 1998) (citations omitted). *See also Cerrillo-Perez v. INS,* 809 F.2d 1419, 1424 (9th Cir. 1987) (remanding to the Board of Immigration Appeals (BIA)) ("We have stated in a series of cases that the hardship to the alien resulting from his separation from family members may, in itself, constitute extreme hardship.") (citations omitted). The AAO notes that the present case arises within the jurisdiction of the Ninth Circuit Court of Appeals. Separation of family will therefore be given the appropriate weight under Ninth Circuit law in the assessment of hardship factors in the present case.

Counsel's contentions that there is a "minimum number of factors" the adjudicator must evaluate and that factors tending to show hardship to the applicant himself must be considered are without merit. *See Brief in Support of Appeal to the Administrative Appeals Unit* (October 2, 2003), at 2-4 ("Brief"). The BIA specifically states in *Cervantes-Gonzalez*, "not all of the foregoing factors need be analyzed in any given case, we . . . apply those factors to the present case *to the extent they are relevant* in determining extreme hardship to the respondent's spouse." *Cervantes-Gonzalez, supra* at 566 (emphasis added). Contrary to counsel's assertion, the appropriate rule is consideration of "all the *relevant* factors." *See Shooshtary v. INS,* 39 F.3d 1049, 1051 (9th Cir. 1994) (emphasis added); *see also Brief*, at 3. The BIA explicitly found the factors listed above to be non-exclusive so, to the extent there are other considerations tending to show hardship present in the facts of the case, they will be taken into account; but only to the extent that they are relevant to determining hardship to the *qualifying relative*, defined as a U.S. citizen or lawful permanent resident spouse or parent of the applicant. As stated above, hardship to the alien himself or to other parties is not permitted by the statute in determining statutory eligibility.

Certain other factors and legal support cited by counsel, particularly that which relates to *In re O-J-O-*, Int. Dec. 3280 (BIA 1996), derive authority from the statutes that governed suspension of deportation prior to April 1, 1997. These factors, with respect to the applicant alien, including continuous physical presence in the United States for seven years, good moral character, extreme hardship to self, and extreme hardship to the applicant's children, are elements of statutory eligibility for suspension and are not permissible factors under the statute that governs the instant application for waiver. Counsel's contention that these factors should apply to the determination under section 212(i) of the Act is in error. "Cross-application" of extreme hardship standards between different benefits, such as suspension of deportation as it existed prior to April 1, 1997, and waivers under section 212(i) of the Act, is limited by the statutes under which eligibility is determined. *See Cervantes-Gonzalez*, at 565. Such cross-application of administratively and judicially developed factors is intended to foster consistency in interpreting substantially similar statutory requirements, but may not be used to undermine or otherwise alter the terms of the applicable statute. Therefore, the factors cited above in this paragraph are not relevant to the applicant's statutory eligibility under section 212(i) of the Act and may be taken into account, if at all, only as to the exercise of discretion once statutory eligibility is established. Similarly, certain other factors cited by counsel, which derive from *Matter of Anderson,* 16 I&N Dec. 596, such as age, length of residence, immigration history, and position in the community can only be considered as to how those factors contribute to the hardship faced by the qualifying relative, not the applicant him or

herself. If, in a particular case, any of the above factors are not present or not relevant to that determination, the law provides that they need not be considered.

Turning to the facts presented in the instant case, the record shows that the applicant and his wife (Ms. [redacted] married in 199[redacted] was born in Mexico and has been a naturalized U.S. citizen since 1978. The applicant and his wife each have a child from a prior relationship; only the child [redacted] lives in the couple's household[redacted] mother and father also reside in the home[redacted] statement attests to the emotional hardship that would result if the applicant were refused admission, both directly to herself and indirectly through the emotional suffering of her child, who was abandoned by her natural father and has only known the applicant as a father. Tax records submitted below show that the applicant and his wife claim her mother and father as dependents. These records also show tha[redacted]mployment has contributed substantially to the household income in the years 2000-2002, providing approximately 58%, 63%, and 55% of the gross household income for those three years, respectively. The couple jointly purchased a home in 2001. The AAO notes that her income alone in each of these years exceeded the 2003 Department of Health and Human Services poverty guidelines for a family of four.

Country conditions documents in the file indicate that Mexico's economy, educational conditions, and medical facilities are unlikely to support the family's standard of living to the same extent as that of United States. *See* Applicant's Exh. 13-15.

The record is silent as t[redacted]family or other ties to Mexico and the ability of[redacted] parents to contribute to the household income through employment or otherwise. There is also no indication of any serious health conditions on the part of the qualifying relative or other relevant party.

There are a number of letters in the file attesting to the character of the applicant. He has also admitted and apologized for the error in judgment, which was apparently committed during a very desperate time when he had no means to support himself in the United States.

USCIS is not insensitive to the applicant's situation. In any event, the decision on the waiver application must comport with the law. The record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors cited above, separately and in the aggregate, does not support a finding under the applicable laws that [redacted] faces extreme hardship if the applicant is refused admission. Rather, the record demonstrates that she will face no greater hardship than the unfortunate, but expected, disruptions, inconveniences, and difficulties arising whenever a spouse is removed from the United States. Congress provided for a waiver of inadmissibility, but under limited circumstances. In limiting the availability of the waiver to cases of "extreme hardship," Congress did not intend that a waiver be granted in every case where a qualifying relationship exists. U.S. court decisions have repeatedly held that the common results of removal are insufficient to prove extreme hardship. *See Hassan v. INS,* 927 F.2d 465, 468 (9th Cir. 1991), *Perez v. INS,* 96 F.3d 390 (9th Cir. 1996); *Matter of Pilch,* 21 I&N Dec. 627 (BIA 1996) (holding that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship); *Matter of Shaughnessy,* 12 I&N Dec. 810 (BIA 1968) (holding that separation of family members and financial difficulties alone do not establish extreme hardship). "[O]nly in cases of great actual or prospective injury . . . will the bar be removed." *Matter of Ngai,* 19 I&N Dec. 245, 246 (BIA 1984). Further, demonstrated financial difficulties alone are generally insufficient to establish extreme hardship. *See* INS v. Jong Ha Wang, *450 U.S. 139 (1981)* (upholding BIA finding that economic detriment alone is

insufficient to establish extreme hardship). The record below, which has not been supplemented with further evidence to show hardship, shows the normally expected results of deportation, which do not rise to the level of "extreme" as contemplated by the statute and relevant case law.

The AAO therefore finds that the applicant failed to establish extreme hardship to his U.S. citizen spouse as required under INA § 212(i), 8 U.S.C. § 1186(i).

In proceedings for application for waiver of grounds of inadmissibility under section 212(i) of the Act, the burden of proving eligibility rests with the applicant. INA § 291, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.